

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORMAN DICKINSON,)	
)	
Petitioner)	
)	
v.)	Civil No. 00-60-B
)	
STATE OF MAINE)	
)	
Respondent)	

ORDER TRANSFERRING PETITION TO
FIRST CIRCUIT COURT OF APPEALS FOR REVIEW

I. INTRODUCTION

On March 30, 2000, Norman E. Dickinson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Because Dickinson had previously filed a petition stemming from the same criminal judgment of conviction as the current petition, this Court transferred Dickinson's latest petition to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A) (Supp. 2000) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). The Court of Appeals transferred the petition back to this Court because, based on the record forwarded to it, it could not tell whether the petition constituted a "second or successive" petition. The Court of Appeals instructed as follows:

We . . . ask that the District Court review the matter, determine whether the petition is second or successive, and provide a brief explanation if it determines that the filing is second or successive. If it determines that the

filing is a second or successive petition, it may either dismiss the § 2254 petition or retransfer it to this court. If it determines that it is not second or successive, then it may proceed to adjudicate the § 2254 petition.

In compliance with this directive, we have compiled the following factual record.

II. FACTS

On April 6, 1990, Petitioner Norman Dickinson was sentenced for Robbery, Kidnapping, and Criminal Threatening with a Dangerous Weapon in the State of Maine, Cumberland County Superior Court, following the acceptance of guilty pleas tendered on October 30, 1989. The court imposed various concurrent sentences on these counts. The longest sentence imposed was a twenty-year term of imprisonment in the custody of the Department of Corrections, State of Maine, all but ten years suspended, with a five-year period of probation.¹ Dickinson did not appeal these criminal judgments to the Maine Supreme Judicial Court, sitting as the Law Court, nor did he seek sentence review pursuant to 15 M.R.S.A. §§ 2151-2157 (Supp. 1989). He did, however, file a *pro se* Motion for Reduction of Sentence in the Superior Court, which was ultimately dismissed as untimely. Dickinson did not appeal the order of dismissal.

In October of 1992, Dickinson initiated his first of three *pro se* habeas corpus proceedings pursuant to 28 U.S.C. § 2254. In his first petition, Dickinson argued that his constitutional right to counsel had been violated because, among other things, his counsel had allegedly misinformed him as to the meaning of a “suspended” sentence. This court

¹ Although the terms of Dickinson’s probation are not evident from the record in this proceeding, they are described by the Maine Supreme Judicial Court in an opinion as follows.

The conditions of probation imposed by the court were stringent, including requirements that Dickinson’s probation officer approve his residence; that Dickinson not change his residence without the prior approval of his probation officer; and that Dickinson remain at his residence except when his probation officer approved, in advance, travel to and from specific locations for specific purposes.

Maine v. Dickinson, 1998 ME 27, ¶ 2, 706 A.2d 586, 587.

dismissed that petition due to failure to exhaust remedies available to Dickinson in Maine. (*Norman E. Dickinson v. State of Maine*, United States District Court, District of Maine, Civil No. 92-0201-B).

After his first section 2254 petition, Dickinson filed a series of state court *pro se* post-conviction review motions. Eventually, after a series of appeals and a number of changes of counsel, the Law Court ordered that the Defendant should be re-sentenced. A re-sentencing hearing was held on March 1, 1996. Following the hearing, the Superior Court imposed on Dickinson the identical sentence that it had imposed in 1989. Defendant thereafter sought leave from the Sentence Review Panel to appeal his newly imposed sentences and filed a motion with the sentencing judge to correct his sentence. Both motions were denied.

Shortly thereafter, Dickinson filed another motion for state post-conviction review on July 22, 1996. This motion was voluntarily dismissed on November 6, 1996. However, on December 11, 1996, Dickinson reinitiated his state post-conviction review proceeding. These petitions both alleged ineffective assistance by his court appointed counsel during his 1996 re-sentencing hearing. While the post-conviction proceeding was pending, Dickinson filed his second section 2254 habeas corpus petition with this court on December 23, 1996. Dickinson's state petition was ultimately unsuccessful. Nevertheless, because Dickinson's state proceeding was still pending at the time his second habeas corpus petition was considered, this court dismissed the petition for failure

to exhaust state remedies on April 8, 1997. (*Norman E. Dickinson v. State of Maine*, United States District Court, District of Maine, Civil No. 96-0248-B).²

Meanwhile, on January 24, 1997, shortly before this Court dismissed his second section 2254 petition, Dickinson completed his ten-year term of imprisonment and began serving his five-year period of probation. On January 29, 1997, the Division of Community Corrections, which was overseeing Dickinson's probation, moved to amend the terms of Dickinson's probation to ensure that he could be required to reside at the Bangor Pre-Release Center until his probation officer could locate a suitable long-term residence for him. This motion was granted by order of the Superior Court. Dickinson appealed the court's order to the Law Court. While his appeal was pending, however, Dickinson violated the terms of his probation and on August 26, 1997 the Superior Court revoked his probation and ordered Dickinson to serve three years of his suspended sentence.³

Following the revocation of his probation, Dickinson filed a notice of appeal to the Law Court and he simultaneously filed his fourth state court post-conviction proceeding alleging ineffective assistance of counsel during his probation revocation proceeding. Dickinson's post-conviction proceeding was summarily dismissed, based upon a finding that a claim of ineffective assistance in the context of a probation revocation proceeding was not statutorily cognizable under 15 M.R.S.A. § 305-A (Supp. 1997). By written order dated December 29, 1997, the Law Court denied Dickinson's

² The second section 2254 proceeding spawned *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996) (holding that because Dickinson's first section 2254 petition was dismissed for failing to exhaust state remedies, this petition was not a second or successive petition within the meaning of 28 U.S.C. § 2244(b)).

³ Because Dickinson was no longer subject to the terms of probation that were the subject of his appeal, the Law Court dismissed Dickinson's appeal as moot on February 9, 1998. *Dickinson*, 1998 ME 27, ¶8, 706 at 588.

request for a certificate of probable cause. On January 20, 1998, Dickinson initiated his third section 2254 action in this Court, this time seeking relief relative to the revocation of his probation on August 26, 1997.

This Court addressed Dickinson's third section 2254 petition on the merits because, unlike his prior two petitions, Dickinson had at that time exhausted all relevant remedial avenues in the state court. On July 10, 1998, this Court denied Dickinson's petition based on the conclusion that his ineffective assistance of counsel claims lacked merit. The Court concluded that, assuming the familiar *Strickland v. Washington*, 466 U.S. 668, 687 (1984) two prong standard was applicable, counsel's performance fell well within the sixth amendment standard regarding effective assistance. (*Norman E. Dickinson v. State of Maine*, United States District Court, District of Maine, Civil No. 98-0013-B). No appeal was taken from that judgment entered July 10, 1998.

Dickinson filed the instant habeas corpus petition, his fourth, on March 30, 2000, approximately four months prior to the termination of his current probation revocation sentence. Since that time, Dickinson was released on July 21, 2000 and, within days, was picked up again for new violations of probation. Dickinson is currently in Cumberland County Jail awaiting a hearing in October on his third probation violation.⁴

On March 30, 2000, Dickinson filed his fourth Section 2254 petition. In his latest petition, Dickinson asserts three grounds for relief: (1) he attacks the validity of his sentence without explanation or supporting facts; (2) he seeks release from

⁴ According to his probation officer, Dickinson has an uncontrollable urge to masturbate whenever he is in the presence of adult women. Such acts of public indecency constitute his most recent probation violations and also served as partial grounds for prior revocations. The officer also stated that the Department of Corrections is seeking a complete revocation of Dickinson's probation and recommitment in the Super Max Prison in Warren for the balance of Dickinson's underlying sentence.

“confinement;” and (3) he seeks an expansion of the “perimeters of his confinement,” which he describes as enlarging “the scope of his conditional liberty.”

III. DISCUSSION

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 to impose restrictions on the ability of federal and state prisoners to obtain post-conviction relief through habeas corpus petitions. *See* 28 U.S.C. § 2244 (Supp. 2000).⁵ These limitations require that a habeas corpus petitioner not be permitted to file a second or successive petition for habeas corpus in the district court until the petitioner has moved in

⁵ The provisions of the Act provide, in pertinent part, as follows:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

the appropriate court of appeals for an order authorizing the district court to consider the petition. *See id.* § 2244(b)(3)(A).

In order to comply with the Court of Appeal’s directive, this court must determine whether the instant petition constitutes a second or successive petition pursuant to the language of the Act. If it does, this Court must determine whether the claims advanced in the petition were already presented to the court in a prior petition. If they have previously been considered, this court should dismiss the new petition pursuant to § 2244(b)(1). If the claims are new claims that have not been presented in a prior petition, they will be heard pursuant to § 2244(b)(2) provided that:

- (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). If this test cannot be met, the petition will be dismissed. *Id.* The Act provides that the determination of this issue is for a three-judge panel of the Circuit Court in the first instance, and that the panel may only authorize the district court to consider a second or successive application “only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” *Id.* § 2244(b)(3)(B) & (C).

A. Whether Dickinson’s latest petition is second or successive?

Although a literal reading of the Act would lead to the conclusion that this petition is a second or successive petition, not every literally second or successive

petition is second or successive for purposes of the Act. *See Sustache-Rivera*, 221 F.3d at 12 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-646 (1998)).

The Supreme Court and this court have outlined several situations in which a later petition is not "second or successive:" (1) where the later petition raises the same grounds as a previous petition that had been dismissed as premature; (2) where a state prisoner's later petition raises the same grounds as a previous petition that had been dismissed for failure to exhaust state remedies; (3) where the earlier petition terminated without a judgment on the merits; or (4) where the later petition attacks a different criminal judgment, such as where a prisoner who has successfully brought a first habeas claim is retried, reconvicted, and resentenced and then attacks the new judgment. The first three exceptions involve nominally successive petitions that are really extensions of original petitions that, for technical or prematurity reasons, were not addressed on the merits. The fourth exception is for a petition attacking an entirely different criminal judgment than was attacked in the first petition.

Id. at 12-13 (citation omitted).

In this his fourth petition, Dickinson challenges "the validity of his sentence" and "seeks release from his confinement" or "an expansion of the perimeters of his confinement." The grounds asserted fail to indicate what constitutional infirmities Dickinson's confinement may be based on. In fact, Dickinson's "grounds" for relief are not really grounds at all, but rather constitute one conclusory statement and two pleas for relief. This inherent flaw in the petition is in contrast to Dickinson's prior three petitions, all of which asserted ineffective assistance of counsel as grounds for relief. Due to this flaw, it is almost impossible for this Court to even surmise independently the basis for his petition.

In any event, it appears from the record that Dickinson's petition is a second or successive petition subject to the restrictions set forth in section 2244. This is based on the fact that this Court addressed the merits of Dickinson's third petition and concluded that his first revocation of probation proceeding, occurring after he had been re-sentenced

(subject to a new criminal judgment of conviction), was not grounded on a violation of Dickinson's right to procedural due process. In the current petition, Dickinson presumably complains of the terms of that confinement, given that his petition was filed with this Court while he was still incarcerated pursuant to the revocation of probation. For this reason, I conclude that the current petition is Dickinson's second.⁶ As an aside, I would draw this conclusion even if Dickinson's petition alleged a constitutional violation related to a more recent revocation proceeding or the terms of his probation because any such complaints would still stem from the same underlying criminal judgment of conviction. *See Keith v. Sullivan*, 956 F.Supp. 1478, 1484 (E.D. Wis. 1997) (holding that although petitioner's prior petition challenged his conviction and the current petition challenged the subsequent revocation of his probation, all claims "related to the same conviction").

B. Whether Dickinson's successive pleading should be dismissed?

Clearly, Dickinson's new claims fail to show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Moreover, they fail to establish one of the other two criteria, either that they rest on a new rule of constitutional law made retroactively applicable to Dickinson's case or that there exist factual predicates to the claim that could not have been discovered previously. Dickinson alleges no facts. For this reason, dismissal of Dickinson's successive petition is

⁶ Because Dickinson's first two petitions were dismissed for failure to exhaust state remedies, they could not be counted even if they post-dated Dickinson's re-sentencing.

warranted and the only question that remains is whether this court is authorized to dismiss the petition without an independent analysis of these factors.

Pursuant to the provisions of section 2244(b)(2), it would be inappropriate for this Court to address the merits of Dickinson's petition without first obtaining authorization from the panel. *See* 28 U.S.C. § 2244(b)(2); *see also Sustache-Rivera v. United States*, 221 F.3d 8, 11 (1st Cir. 2000). Presumably, when the Court of Appeals instructed this Court to either dismiss the petition or retransfer it to the panel upon a finding that the petition is second or successive, they meant that we should dismiss the petition *pursuant to § 2244(b)(1)* if it is found to be second or successive *and* presents a claim that has already been presented in a prior petition. If that circumstance were readily apparent, I would recommend the District Judge dismiss the matter. Because it is not possible to determine whether Dickinson's petition presents the same claims he presented previously even though it arises from the same judgment of conviction, his petition must be disposed of through § 2244(b)(2) and (b)(3). This channel requires that this Court transfer the petition to a panel of the First Circuit Court of Appeals so that they may review the petition pursuant to § 2244(b)(3)(A)-(C).

IV. CONCLUSION

Based on the foregoing, I hereby ORDER the Clerk to retransfer this petition to the First Circuit Court of Appeals for its review. The Clerk shall include a copy of this Order with the petition to augment the record and assist the Court of Appeals in its § 2244(b)(3) analysis. In the event that the Court of Appeals determines, contrary to the analysis set forth above, that the petition should be addressed on the merits, it will return the petition to this Court.

SO ORDERED.

Dated this 25th day of September, 2000.

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-60

DICKINSON v. MCI

Filed:

03/30/00

Assigned to: JUDGE GENE CARTER

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

NORMAN E DICKINSON
 plaintiff

NORMAN E DICKINSON
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v.

MAINE CORRECTIONAL INSTITUTION
 defendant